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Supreme Court, U.S.
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In The

Supreme Court of the United States

OKEY GARRY OKPALA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

OKEY GARRY OKPALA
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QUESTIONS PRESENTED

I

Did *United States v. Booker*, 543 U.S. 220 (2005) announce a new rule or was it dictated by precedent or was it a clarification of the Federal Sentencing Reform Act of 1984 that made the United States Sentencing Guidelines mandatory.

II

Did the district court err in *sua sponte* recharacterizing properly denominated petition for a writ of habeas corpus pursuant to the savings clause of 28 U.S.C. § 2255 as second or successive motion to vacate, 28 U.S.C. § 2244, contrary to this Court's decisions in *Castro v. United States*, 540 U.S. 375 (2003); *Felker v. Turpin*, 518 U.S. 651 (1996); and in conflict with *Collins v. Holinka*, 510 F.3d 666, 667 (7th Cir. 2007).

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

The Petitioner herein, Okey Garry Okpala ("Mr. Okpala"), respectfully prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Eleventh Circuit, the United States District Court for the Northern District of Georgia, Atlanta Division, entered in the above-entitled proceeding on June 10, 2008, *sua sponte* reclassifying Mr. Okpala's petition for a writ of habeas corpus pursuant to the savings clause of 28 U.S.C. § 2255 as second or successive motion to vacate filed pursuant to 28 U.S.C. § 2244, and dismissing the same for lack of jurisdiction.

ORDERS BELOW

The unpublished Orders of the United States Court of Appeals for the Eleventh Circuit was issued on April 30, 2008. A timely motion for a reconsideration was denied on June 10, 2008. The copies of the Court of Appeals Orders appear as Appendix A and attached hereto. The unpublished Orders of the United States District Court for the Northern District of Georgia, entered on December 4, 2007, at 6-9, and on January 22, 2008, at 5-11 respectively appear as Appendix B and attached hereto.

STATEMENT RELATIVE TO JURISDICTION

The Orders of the United States District Court was entered on December 4, 2007, and January 22, 2008, respectively. A timely petition for review was denied on June 10, 2008, by the Court of Appeals for the Eleventh Circuit. The jurisdiction of this Court to review the Orders of the District Court and the Court of Appeals is invoked under 28 U.S.C. § 1254(1); Rule 10(a), Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . , and to be informed of the nature and cause of the accusation.

U.S. Const. amend. VI.

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury

> . . . nor be deprived of life, liberty, or property without due process of law.

U.S. Const. amend. V.

STATEMENT OF THE CASE

On November 18, 2005, the Petitioner, Mr. Okpala filed a petition for a writ of habeas corpus pursuant to the savings clause of 28 U.S.C. § 2255, contending, inter alia, the *United States v. Booker,* 543 U.S. 220 (2005) should apply retroactively on collateral review because it was sufficiently within the scope of then existing jurisprudence at the time of Mr. Okpala's sentence in 1993 to considered dictated by precedent; therefore, *exempt* from *Teague v. Lane,* 489 U.S. 288, 311 (1989) non-retroactivity doctrine. That *Booker* rule should apply retroactively on collateral review because *Booker* Court was interpreting what legislature intended when Federal Sentencing Reform Act of 1984 was enacted; therefore, exempt from *Teague* non-retroactivity doctrine. That he could not raise his *Booker* claim in a second or successive motion, 28 U.S.C. §§ 2255 and 2244, because *Booker* decision is neither a new constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; nor newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found Mr. Okpala

guilty of the alleged offense. Further, second or successive motion can only be used to challenge the conviction and not the sentence. That the law existing at the time of Mr. Okpala's conviction and sentence foreclosed Mr. Okpala's *Booker* claim; therefore, Mr. Okpala could not raise his *Booker* claim during original sentencing proceeding, direct appeal, and first motion to vacate, 28 U.S.C. § 2255.

That *Booker* error constitutes fundamental defect which inherently results in a complete miscarriage of justice in that Mr. Okpala's presumptive maximum statutory sentence of 20 years was enhanced to 30 years by drug amount that was not alleged in the indictment, was not proved and decided by the jury beyond a reasonable doubt; in that Mr. Okpala's presumptive maximum statutory sentence of 20 years was enhanced by 4 levels under United States Sentencing Guidelines ("USSG") § 3B1.1(a), by 2 levels under USSG 3C1.1. based on facts that were not alleged in the indictment, proved and decided by the jury beyond a reasonable doubt, to 30 years.

On December 4, 2007, the District Court, *sua sponte,* recharacterized Mr. Okpala's petition for a writ of habeas corpus pursuant to the savings clause as a second or successive motion to vacate, 28 U.S.C. § 2244, stated in a footnote that *Booker* does not apply retroactively in light of *Varela v. United States,* 400 F.3d 864, 868 (11th Cir. 2005) (holding that "*Booker*'s constitutional rule falls squarely under the category of new rules of criminal procedure that do not apply retroactively to § 2255 cases on collateral

review"); and dismissed the same for lack of jurisdiction. Copies of the District Court Orders are marked as Appendix B and attached hereto, at 6-9, 5-11 respectively.

On January 4, 2008, Mr. Okpala filed a timely notice of appeal, motion for leave to proceed in forma pauperis on appeal, and an application for the issuance of Certificate of Appealability ("COA"), in the District Court. Mr. Okpala contended that COA should issue on the ground that it is debatable whether the district court err in *sua sponte* recharacterizing his clearly denominated petition for a writ of habeas corpus pursuant to the savings clause, 28 U.S.C. § 2255, as second or successive motion to vacate, 28 U.S.C. § 2244, given that the petition advanced the kind of arguments and sought the kind of relief covered by the savings clause as interpreted by the Eleventh Circuit in *Wofford v. Scott,* 177 F.3d 1236, 1238 (11th Cir. 1999), given that the substance of the petition clearly shows that Mr. Okpala intended to file a petition pursuant to savings clause and not second or successive motion to vacate, citing *Collins v. Holinka*, 510 F.3d 666, 667 (7th Cir. 2007); *Castro v. United States,* 540 U.S. 375 (2003); *Felker v. Turpin,* 518 U.S. 651 (1996) for the proposition that the district court must respect the jurisdictional statute invoked by Mr. Okpala.

On January 22, 2008, the District Court denied Mr. Okpala's application for the issuance of COA and motion for leave to proceed in forma pauperis on appeal.

On February 4, 2008, Mr. Okpala renewed his application for the issuance of COA and motion to leave to proceed in forma pauperis on appeal in the Court of Appeals raising the same issue as was raised in the District Court and herein in question II.

On March 30, 2008, the Court of Appeals denied Mr. Okpala's application for the issuance of COA and motion for leave to proceed in forma pauperis, without explanation.

On May 2, 2008, Mr. Okpala filed a motion for a reconsideration. The motion was denied on June 10, 2008, without explanation.

Mr. Okpala is presently incarcerated at the Federal Correctional Institution, Talladega, Alabama.

The detention challenged in petition for a writ of habeas corpus pursuant to the savings clause arose from the judgment and commitment of 360 morths' imprisonment issued by District Court Judge, G.E. Tidwell, in 1993, based on, an alleged dry drug conspiracy, on a first time non-violent offender.

Pursuant to Rule 10(a), Supreme Court Rules, it is necessary for this Court to grant a certiorari before Mr. Okpala may submit a full brief to the Honorable Justices of this Court from the Orders of the District Court and the Court of Appeals. The Orders of the District Court and the Court of Appeals are contrary to this Court's decision in *Castro*, *supra*; *Felker*, *supra*; and in conflict with the Seventh Circuit decision in *Collins*, *supra* (holding that the district court

must respect the jurisdictional statute invoked by a party bringing the action).

REASONS FOR GRANTING THE WRIT

I

A grant of review by this Court is necessary to settle an important question of law which impacts a significant segment of the population, namely, individuals whose sentences exceeded the maximum statutory sentence authorized by the statutes of conviction, because, judge made findings of fact that were used to exceed the maximum statutory sentence authorized by the jury verdict or facts admitted by the defendant – that were neither alleged in the indictment, proved and decided by the jury beyond a reasonable doubt, nor admitted by the defendant. *United States v. Booker,* 543 U.S. 220, 244 (2005); because, the *Booker* rule should apply retroactively on collateral review on the ground that it was sufficiently within the scope of the existing jurisprudence at the time of Mr. Okpala's conviction and sentence in 1993, to be considered dictated by precedent, therefore, *exempt* from *Teague v. Lane,* 489 U.S. 288, 311 (1989) non-retroactivity doctrine or because *Booker* Court was interpreting what legislature intended when the Federal Sentencing Reform Act of 1984 was enacted, therefore, *exempt* from *Teague* non-retroactivity doctrine.

II

A grant of review by this Court is necessary to settle a split between the Eleventh Circuit Court of Appeals and the Seventh Circuit Court of Appeals' Court decision in *Collins v. Holinka,* 510 F.3d 666, 667 (7th Cir. 2007); and to uphold this Court's decisions in *Felker v. Turpin,* 518 U.S. 651 (1996) and *Castro v. United States,* 540 U.S. 375 (2003).

BOOKER RULE SHOULD APPLY RETROACTIVELY ON COLLATERAL REVIEW BECAUSE IT WAS SUFFICIENTLY WITHIN THE SCOPE OF THEN EXISTING JURISPRUDENCE AT THE TIME OF MR. OKPALA'S CONVICTION AND SENTENCE IN 1993 TO BE CONSIDERED DICTATED BY PRECEDENT; THEREFORE *EXEMPT* FROM *TEAGUE* NON-RETROACTIVITY DOCTRINE

In *Booker,* this Court reiterated that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt," *Booker,* 543 U.S. at 244. Under the Federal Sentencing Reform Act of 1984, Guidelines were "mandatory and binding on all judges," *id.*, at 233, and judges often increase a defendant's mandatory Guideline range based on facts not admitted by the defendant or proved to a jury beyond a reasonable doubt. This Court reasoned that, because the Guidelines were

mandatory, such increase sentences based on judge-found facts violated the Sixth Amendment of a jury trial, as the increase sentence exceeded the maximum authorized by the jury verdict. *Id.*, at 245. Accordingly, this Court excised those sections of the Sentencing Reform Act that made the Guidelines mandatory, thereby rendering the Guidelines advisory. *Id.*, at 245-46. This Court made clear in *Booker* decision that it was clarifying what Congress intended when it enacted the Federal Sentencing Act of 1984. *Id.*

The *Booker* decision was dictated by the Sixth Amendment, *In re Winship*, 397 U.S. 358, 364 (1970); *United States v. Gaudin*, 515 U.S. 506, 511 (1995); *Jones v. United States*, 526 U.S. 227, 230 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 574 (2002); and *Blakely v. Washington*, 542 U.S. ___ (2004). Therefore, does not constitute a new constitutional law for purposes of *Teague v. Lane*, 489 U.S. 288 (1989) non-retroactivity analysis. The *Booker* decision is applicable in habeas corpus proceedings to those defendants whose convictions and sentences became final after the Supreme Court's decision in *Winship*, *Gaudin*, *Jones*, *Apprendi*, *Ring*, and *Blakely*.

As a general matter, federal courts may not apply a new Supreme Court's decision on collateral proceedings if to do so would create a "new rule" of constitutional law, subject to two narrow exceptions of

Teague.[1] Subject to the two exceptions of *Teague*, a case decided after a habeas petitioner's conviction and sentence became final may not be the predicate for habeas relief unless the petitioner meets either of the two narrow exceptions of *Teague*. There is an exception to this general principle however, where the new Supreme Court's decision was dictated by constitutional procedural principles that was pre-existing at the time the petitioner's conviction and sentence became final. *Penry v. Lynaugh*, 492 U.S. 302, 316-317 (1989) (recognizing that the application of established general constitutional procedural principles in an analogous context is not a new rule barred by *Teague*); *Stringer v. Blacks*, 503 U.S. 222 (1992) (no new rule established where prior case's rule "emerges not from any single case . . . but from our long line of authority" on matter and, despite differences in the petitioner's case, the result petitioner seeks "follows a *fortiori* from the earlier case"); *United States v. Johnson*, 457 U.S. 537, 549 (1982) ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later decision

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[1] Under *Teague*, a "new rule" should be applied retroactively if 1) "it place[s] certain kind of primary, private individuals conduct beyond the power of the criminal lawmaking authority to proscribe," or 2) it is a "watershed rule [ ] of criminal procedure, implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 489 U.S. at 311.

has not in fact altered that rule in any material way."). *See also Truesdale v. Aiken*, 480 U.S. 527 (1987) (per curiam); *Dunaway v. New York*, 442 U.S. 200 (1979); *Lee v. Missouri*, 439 U.S. 461, 462 (1979) (per curiam). The Supreme Court has held both *Winship* and certain extensions of *Winship* to be fully retroactive. *E.g.*, *Hankerson v. North Carolina*, 432 U.S. 233, 242-44 (1977); *Ivan v. City of New York*, 407 U.S. 203, 204-05 (1972).

"In determining whether a [] prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

> First, we must determine when [petitioner's] conviction and sentence became final for *Teague* purposes . . . Second, we must "survey the landscape as it then existed and determine whether a [] court considering [petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." . . . Third, if we determine that [petitioner] seeks the benefit of a new rule, we must consider whether "that rule falls within . . . the . . . narrow exceptions to the non-retroactivity principle."

Caspari, 510 U.S. at 390.

Applying the first step of *Teague* to the instant case, it is undisputed that Mr. Okpala's conviction became final in 1998. *See Caspari*, 510 U.S. at 390;

Teague, 489 U.S. at 295 (holding that a case is "final" when the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for Certiorari had elapsed).

Applying *Teague*'s second step, the district court in 1998 would have felt compelled by the Supreme Court precedents in *Winship* and its progeny, to conclude that the Sixth Amendment, *Winship* and its progeny prohibit judges from making a finding, by a preponderance of the evidence, that raises a defendant's sentence beyond the sentence that would have lawfully been imposed by reference to facts proven and found by the jury beyond a reasonable doubt or admitted by the defendant. *Booker,* 543 U.S. at (Slip op., at 5). Because *Booker* application of Sixth Amendment principles firmly established by 1990 compel that Mr. Okpala be sentenced solely on the facts determined by the jury beyond a reasonable doubt, the rule set forth in *Booker* he now seeks to benefit from is not new, and hence not barred by *Teague.*

In *Teague*, a plurality of the Supreme Court espoused Justice Harlan's view of retroactivity that a new rule of law would not be applied on collateral review to cases that became final prior to the announcement of the new rule. *Teague,* the Court has clarified that this principle of non-retroactivity serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of convictions valid when entered. *Sawyer v. Smith,* 497 U.S. 227 (1990).

Moreover, the rule reflects the limited purpose of federal habeas corpus "to ensure that [] convictions comply with the federal law in existence at the time the conviction became final, and not provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Id.*

Applying the non-retroactivity principle in a way that balances the need for finality of convictions against the need to enforce minimal constitutional protections has proven challenging. Even in *Teague* the court acknowledged that the task of determining whether a case announces a new rule is often difficult. For that reason, the *Teague* court expressly did not "attempt to define the spectrum of what may or may not constitute a new rule" for purposes of retroactivity. *Teague,* 489 U.S. at 301; *see also Mackey v. United States,* 401 U.S. 667, 695 (1971) (Harlan, J., concurring in judgments and dissenting in part) (recognizing "the inevitable difficulties that will arise in attempting to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law"). The *Teague* court, however, offer the following general guidelines:

> "[A] case announces a new rule when it breaks new ground or imposes a heretofore new obligation on the states or the Federal Government. To put it differently, a case announces a new rule if the result was not

> dictated by precedent existing at the time the petitioner's conviction became final."

Id. (emphasis in original) A majority of the court employed these guidelines shortly after *Teague* in *Penry v. Lynaugh,* 492 U.S. 302, 316 (1989). In *Penry* the majority of the court adopted *Teague*'s non-retroactivity doctrine. *See id.* Thus, the analysis in *Penry* is instructive with respect to the distinction between a new rule under *Teague* and an application of established principles to a case that is analogous to prior precedent.

Penry claims that his Eighth Amendment rights were violated because the jury in his capital murder trial was unable to fully consider and give effect to mitigating evidence of his mental retardation and childhood abuse when answering Texas' three statutory special issues at sentencing. Penry did not facially challenge the Texas death penalty statute. Instead, Penry claimed that, "*on the facts of [his] case,* the jury was unable to fully consider and give effect to the mitigating evidence . . . in answering the three special issues." 492 U.S. at 315 (emphasis added). The State argued that Penry's asserted rule amounted to an extension of established principles and consequently was barred by *Teague.* The court was thus faced with determining whether the rule asserted by *Penry* was an application of established principles or a new rule of law.

Prior to 1986, when Penry's conviction and sentence became final, the Supreme Court had established that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *See Penry*, 492 U.S. at 316 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Court had stressed this fundamental principle in upholding Texas' capital punishment statute against a facial Eighth Amendment challenge in *Jurek v. Texas*, 428 U.S. 262 (1976). In *Jurek*, the court concluded that Texas' sentencing scheme satisfied the Eighth Amendment provided that sentencing juries were allowed to consider any mitigating circumstances relevant to a specific case. *Jurek*, 428 U.S. at 272. Supreme Court decisions subsequent to *Jurek* and *Woodson,* but prior to *Penry*'s conviction becoming final, reaffirmed the need for an individualized assessment of the appropriateness of the death penalty under the Eighth Amendment. *See Lockett v. Ohio,* 438 U.S. 586 (1978); *Eddings v. Oklahoma,* 455 U.S. 104 (1982) (both concluding that a sentencer cannot he precluded from considering and giving affect to relevant mitigating circumstances when determining the appropriateness of the death penalty in a particular case). At the same time, however, no Supreme Court decisions prior to *Penry* had commanded courts to instruct juries how to consider specific mitigating evidence in a particular case. Instead, the case law

established fundamental Eighth Amendment principles for application in analogous case.

The Supreme Court concluded that despite the absence of a specific holding requiring the instruction sought by Penry the rule Penry sought to benefit from was dictated by the Eighth Amendment principles espoused and enforced in the Court's prior cases. According to the Court, it was firmly established at the time of Penry's conviction that a sentencer in Texas had to consider any mitigating evidence specific to that circumstances of Penry and his crime. *Penry,* 492 U.S. at 317. The rule Penry sought – a requirement that the jury be instructed specifically what mitigating evidence it should consider and how it should consider that evidence when answering Texas' special issues – was not "new" for the purposes of *Teague* because it represented a specific application of general Eighth Amendment principles outlined in prior analogous cases. Though Penry's claim for relief did require the State to issue specific instructions that it previously had not issued, the rule which controlled Penry's case was nevertheless not new. Moreover, the rule did not impose a new obligation on Texas, it simply required that Texas fulfill its obligation, expressed in *Jurek*, to ensure "that the special issues of Texas capital punishment statute would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." *Id.*

Penry's recognition that the application of established general constitutional principles in an analogous context is not a new rule barred by *Teague* in part because ("there is surely nothing new about this principle. . . ."); *see also Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring) ("if a proferred factual distinction between the case under consideration and pre-existing precedent's underlying principles apply, the distinction is not meaningful, and any deviation from precedent is not reasonable").

Just as Penry sought an application of Eighth Amendment principles well-established at the time of his conviction became final, Mr. Okpala now seeks the application of Sixth Amendment principles that were well-established at the time that his conviction became final. Just as *Teague* did not prevent Penry from receiving the benefit of established Eighth Amendment protections, it should not prevent Mr. Okpala from receiving the benefit of established Sixth Amendment protection as interpreted in *Booker*.

In the instant case, at the time Mr. Okpala's conviction became final in 1998 it was well-established in the legal landscape that defendants have the Sixth Amendment right that a judge may impose sentence based solely on the facts reflected in the jury verdict or admitted by the defendant. In *Booker*, the Supreme Court applied the Sixth Amendment principles set forth in *Winship*, *Gaudin*, *Jones*, *Apprendi*, *Ring*, and *Blakely*, to the federal sentencing act. It did not create a new constitutional rule of criminal procedure; rather, it applied an

existing one. Put another way, the determination that federal district judges have been improperly enhancing defendants sentences based on facts not proven and found by the jury beyond a reasonable doubt or admitted by defendant within the meaning of Sixth Amendment, *Winship, Gaudin*, *Jones*, *Apprendi, Ring*, and *Blakely* did not establish a new rule of criminal procedure. The *Booker* Court made this clear at the outset of its decision:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all elements of the crime with which he is charged." *United States v. Gaudin,* 515 U.S. 506, 511 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedure.
>
> In *Jones v. United States,* 526 U.S. 224, 230 (1999), we considered the federal carjacking statute, which provides three different maximum sentences depending on the extent of harm to the victim, 15 years in jail if there was no serious injury to a victim, 25 years if there was "serious bodily injury," and life in prison if death resulted. 18 U.S.C.

§ 2119 (1998 ed., Supp. V). In spite of the fact that the statute "at first glance has a look to it suggesting [that the provisions relating to the extent of harm to the victim] are only sentencing provisions," 526 U.S. at 232, we concluded that the harm to the victim was an element of the crime. That conclusion was supported by the statutory text and structure, and was influenced by our desire to avoid the constitutional issues implicated by a contrary holding, which would have reduced the jury's role "to the relative importance of low-level gate keeping." *Id.*, at 244. Foreshadowing the result we reach today, we noted that our holding was consistent with a "rule requiring jury determination of facts that raise a sentencing ceiling" in state and federal sentencing guidelines systems. *Id.*, at 251, n.11.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant pleaded guilty to second degree possession of a firearm for an unlawful purpose, which carried a prison term of 5-to-10 years. Thereafter, the trial court found that his conduct have violated New Jersey's "hate crime" law because it was racially motivated, and imposed a 12 year sentence. This court set aside the enhanced sentence. We held: "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, proved beyond a reasonable doubt." *Id.*, at 490. As a matter of simple justice, it seemed obvious that the procedural

safeguards designed to protect *Apprendi* from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not prove a principled basis for treating the two crimes differently. *Id.*, at 476.

In *Ring v. Arizona*, 536 U.S. 574 (2002), we reaffirmed our conclusion that the characterization of critical facts is constitutionally irrelevant. There, we hold that it was impermissible for "the trial judge, sitting alone: to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. *Id.*, at 588-589. "If a state makes an increase in a defendant's authorized punishment contingent of the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt." *Id.*, at 602. Our opinion made it clear that ultimately, while the procedural error in *Ring*'s case might have been harmless because the necessary finding was implicit in the jury's guilty verdict, *id.*, at 609, n.7. "The characterization of a fact or circumstances as an 'element' or a 'sentencing factor' is not determination of the question 'who decides,' judge or jury." *Id.*, at 605.

In *Blakely v. Washington*, 542 U.S. ___ (2004), we dealt with a determinate sentencing scheme similar to the Federal Guidelines. There the defendant pleaded guilty to

kidnapping, a class B felony punishable by a term of not more than 10 years. Other provisions of Washington law, comparable to the Federal Sentencing Guidelines, mandated a "standard" sentence of 49-to-53 months, unless the judge found aggravating facts justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the judge found that the defendant had acted with "deliberate cruelty" and sentenced him to 90 months. *Id.*, at ___) slip op., at 3).

For reason explained in *Jones*, *Apprendi*, and *Ring*, the requirements of the Sixth Amendment were clear. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of "any particular fact" that the law makes essential to his punishment. 542 U.S. ___ (slip op., at 5). That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." *Id.*, at ___ (slip op., at 7) (emphasis deleted). We reject the state's argument that the jury verdict was sufficient to authorize a sentence within the general 10 year sentence for class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence. Our precedents, we explained, make clear "that the 'statutory maximums' for *Apprendi* purpose is the maximum sentence a judge may impose *solely on the basis of* the facts reflected in *the*

> *jury verdict or admitted by the defendant.*" *Ibid.* (slip op., at 7) (emphasis in original). The determination that the defendant acted with deliberate cruelty, like the determination in *Apprendi* that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated *Blakely*'s Sixth Amendment rights.

Booker, 543 U.S. ___ (slip op., at 5-9). Based on the foregoing reasons, despite the absence of a specific holding requiring that Mr. Okpala be sentenced solely on the facts found by the jury beyond a reasonable doubt, the Sixth Amendment principles were espoused and enforced in the Court's prior cases. It was firmly established at the time of Mr. Okpala's conviction that Sixth Amendment – the *Winship reasonable* doubt standard protects the defendant's interest in being free from unjustified less of liberty – protects the defendant's interest from being sentenced based on facts determined by a district judge, sitting alone, by a preponderance of the evidence. Therefore, the *Booker*'s application of firmly established Sixth Amendment's constitutional procedural principles may be applied to Mr. Okpala's case without violating the principle of *Teague* based on the Supreme Court's teachings in *Penry*. *Id.*[2] *See also Stringer*, 503 U.S. at

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[2] By analogy, federal courts routinely entertain the application of established law to different facts in reviewing

(Continued on following page)

230-31 (giving retroactive effect to the Court's decision in *Clemons v. Mississippi*, 494 U.S. 738, 741, despite the fact that several pre-*Clemons* lower court opinions held contrary to *Clemons*,[3] *Truesdale*, *id.*; *Dunaway*, *id.*; *Lee*, *id.*

THE *BOOKER* DECISION IS AN INTERPRETATION OF THE FEDERAL SENTENCING ACT: THEREFORE, EXEMPT FROM *TEAGUE* NON-RETROACTIVITY DOCTRINE

The *Booker* decision is applicable to Mr. Okpala's case as an interpretation of the federal sentencing act and as a substantive change from mandatory sentencing scheme to advisory.

While all of the foregoing analysis and cases set forth in section III clearly support Mr. Diaz's contention that the *Booker* decision does not constitute a

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the constitutionality of searches and seizures of evidence admitted in federal criminal proceedings. If *Teague* were an issue, no one would seriously contend that such cases involve new rules, even though law enforcement officers may be entitled to qualified immunity from civil liability because reasonable jurists could disagree about the constitutionality of a particular application of a Fourth Amendment rule. *See Anderson v. Creighton*, 483 U.S. 635 (1987). The Court has drawn upon *Anderson* for treatment of the level of generality, not its reasonableness in application of a settled rule. *See Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

[3] The purpose of collateral relief under § 2255 is identical to that of the habeas writ generally. *See, Davis v. United States*, 417 U.S. 333, 343 (1974).

new constitutional law, authorities also exist to support the application of *Booker* decision in Mr. Okpala case as an interpretation of federal sentencing act and as a substantive change in the federal sentencing act. This is because in applying its Sixth Amendment holding to the federal sentencing act the Court found that portions of the federal sentencing act is incompatible with its Sixth Amendment holding. The Court modified the federal sentencing act *nunc pro tunc* to their November 1, 1987 effective date

> We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C.A. § 3553(b)(1) (Supp. 2004), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must another statutory section, § 3742(e) (main ed. and Supp. 2004), which depends upon the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended 18 U.S.C. § 991, et seq., makes the Guidelines effectively advisory.

Booker, 543 U.S. at ___ (Remedy slip op., at 2). The Supreme Court's analysis was similar to the Court's analysis in *Bousley v. United States*, 523 U.S. 614 (1998) "[B]ecause *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation to which this Court decides the meaning of a criminal statute enacted by Congress." *Id.*, at 620. *Accord Robinson v. United States*, 196 F.3d 748, 752 (7th Cir. 1999) ("[I]n *Bousley v. United States*,

[supra], the Supreme Court made it clear that *Teague*'s retroactivity bar applies only to new rule of criminal procedure, not to changes in substantive law"). Bousley applied this reasoning to find the *Teague* doctrine inapplicable to a section 2255 movant's reliance on *Bailey v. United States*, 516 U.S. 137 (1995), an intervening decision construing a sentencing enhancement provision in 18 U.S.C. § 924(c) (1994).[4] *See also Schriro v. Summerlin*, 124

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[4] *United States v. Guardino*, 972 F.2d 682, 687 n.7 (6th Cir. 1992) (noting that *Teague* does not bar the retroactive application of a new authoritative interpretation of the Victim and Witness Protection Act that would in affect diminish defendant's sentence); *Callahan v. United States*, 881 F.2d 229, 232 n.1 (6th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990) (Teague "addresses only the retroactivity of 'new constitutional rule of criminal procedure' and thus does not control "cases involving new rules of substantive criminal law); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (noting defendant was entitled, even on collateral review, to the benefit of court's interpretation of a term in 21 U.S.C. § 848 made after defendant's conviction had became final). *United States v. Barnhardt*, 93 F.3d 706, 708 (10th Cir. 1996) (Supreme Court decision defining substantive reach of criminal statute can be applied retroactively to case on collateral review); *United States v. Talk*, 158 F.3d 1064, 1071 (10th Cir. 1998), *cert. denied*, 525 U.S. 1164 (1999) (relying on *Bousley v. United States*, *supra*, in concluding that *Teague* plainly applies only to rules that are both new and constitutional" and therefore deeming *Teague* inapplicable to claim based on Supreme Court ruling on statutory standard for appellate review of Sentencing Guidelines downward departure, given that rule is "not constitutional" and also is not "new" because it merely clarified what statute has always required); *United States v. Stinson*, 30 F.3d 121, 122 (11th Cir. 1994) (Amendment to Sentencing Guidelines commentary which excluded offense of being felon in possession of firearm from

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S.Ct. 2519, 252 (2004) ("New substantive rule generally apply retroactively [on collateral review]. This includes decisions that narrow the scope of a criminal statute by interpreting its terms"). The rationale behind such policy begins with the idea that "a statute, under our system of separate powers of government, *can have only* one meaning." *Brough v. United States,* 454 F.2d 370, 373 (7th Cir. 1972) (emphasis added); *accord Bousley*, 523 U.S. at 620-21 ("[U]nder our federal system it is only Congress, and not the courts, which make conduct criminal." In other words, when a court interprets the scope of an existing criminal statute, that interpretation effectively serves as a declaration of what the statute has always meant. *Gates v. United States,* 515 F.2d 73, 78 (7th Cir. 1975).

Likewise, the *Booker* decision was similar to the Supreme Court's decision in *United States v. Jackson,* 390 U.S. 570 (1968), there, the Court held that the death penalty provision of the Federal Kidnapping Act, 18 U.S.C. § 1201(a), was unconstitutional by making the offense of kidnapping punishable by death only upon the recommendation of the jury, inadvertently failed to provide for the infliction of the death penalty upon those who plead guilty or waive a

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"crime of violence" category for determining career offender status would be applied retroactively, as amendment purported to clarify Guidelines); *United States v. Garcia-Cruz,* 40 F.3d 986, 988 (9th Cir. 1994) (same); *Oliver v. United States*, 90 F.3d 177, 179 (6th Cir. 1996) (*Teague* does not bar the retroactive application of new case interpreting the federal sentencing guideline).

jury trial. The death penalty provision was invalidated because it imposed an impermissible burden upon an accused's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial, but that the remainder of the statute was valid. Since the death penalty was "severable" from the rest of the statute, the Court upheld the validity of the Act after excising the death penalty provision. In *Natale v. United States,* 424 F.2d 725, 727 (9th Cir. 1970), the Court held that the Supreme Court's decision in *Jackson, supra,* is to be applied retroactively on collateral review, because under the interpretation, the death penalty provisions of 18 U.S.C. § 1201(a) have been unconstitutional since the time of first enactment in 1934, and not just since April 18, 1968, the date the Supreme Court decided *Jackson.*

Similar rationale was applied in *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989) when the Supreme Court interpreted a 123-year old statute differently than appellate courts had done since its enactment. As to *Patterson*'s retroactivity the Court said:

> A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction[.] Thus, *Patterson* provides the authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 before the "Congressional 1991

> amendment [overruling Patterson] went into effect on November 21, 1991. [Patterson's] interpretation provides the base line for our conclusion that the 1991 amendment would be "retroactive" if applied to cases arising before that date.

Rivers v. Roadway Express, 511 U.S. 298, 313 (1994).

Based on all the foregoing reasons, *Booker* decision is not barred by *Teague*.

II.

THERE IS A SPLIT OF AUTHORITY BETWEEN THE ELEVENTH CIRCUIT AND THE SEVENTH CIRCUIT ON THE ISSUE AS TO WHETHER THE DISTRICT COURT SHOULD ENTERTAIN A PETITION UNDER THE JURISDICTIONAL AUTHORITY INVOKED BY THE PETITIONER IN THE LOWER COURT AS DICTATED BY THE SEVENTH CIRCUIT IN *COLLINS*. THE LOWER COURT DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN *CASTRO* AND *FELKER*.

In *Felker v. Turpin,* 518 U.S. 651 (1996), this Court held that judges must respect the plaintiff's choice of statute to invoke – whether § 2241, § 2255, or 42 U.S.C. § 1983 – and give the action the treatment appropriate under the law. *Castro v. United States*, 540 U.S. 375 (2003), adds that before reclassifying a proceeding as one under § 2255, the district court first must alert the prisoner to the consequences

of this step and give him an opportunity to withdraw the request. In *Collins v. Holinka,* 510 F.3d 666, 667 (7th Cir. 2007), the Seventh Circuit held that "[p]erson who initiate independent litigation are entitled to have it resolved under the grant of authority they choose to invoke") (citing *Castro* and *Felker*).

In this case, Mr. Okpala filed a petition for a writ of habeas corpus pursuant to the savings clause of 28 U.S.C. § 2255. Mr. Okpala clearly denominated his petition as petition brought under the savings clause of § 2255, citing the Eleventh Circuit precedent on savings clause – *Wofford v. Scott,* 177 F.3d 1236, 1238 (11th Cir. 1999) in support of District Court's jurisdictional authority to hear and entertain the said petition on the merits. The petition advanced the kind of arguments and sought the kind of relief covered by the savings clause as interpreted by the Eleventh in *Wofford* and other circuit courts. The substance of the petition clearly shows that Mr. Okpala intended to file a petition pursuant to the savings clause, and not second or successive § 2255 motion.

Despite, the foregoing clear evidence of Mr. Okpala intention, the District Court *sua sponte* recharacterized Mr. Okpala's petition as having been filed under second or successive § 2255 motion, without alerting Mr. Okpala of its intention to do so and an opportunity to withdraw the petition, before dismissing the said petition as second or successive § 2255 motion. (Appendix B at 6-9 and 5-11 respectively).

Mr. Okpala filed a timely notice of appeal and an application for the issuance of COA in both the District Court and the Court of Appeals, contending, inter alia, that it is debatable among jurists of reason whether the district court's action is consistent with *Felker* and *Castro*; and whether it conflicts with the Seventh Circuit decision in *Collins*. Both the District Court and the Court of Appeals denied Mr. Okpala's application for the issuance of COA. (Appendices A, B at 6-9 and 5-11 respectively).

Mr. Okpala contends that based on the foregoing, it appears that the lower courts' action is inconsistent with this Court's decision in *Castro* and *Felker*, and conflicts with the Seventh Circuit decision in *Collins*, warranting a grant of certiorari to settle the circuit split and to uphold this Court's decisions in *Castro* and *Felker*. *See* Rule 10(a), Supreme Court Rules. The question whether the lower court arbitrarily reclassified prisoner's properly denominated petition for a writ of habeas corpus pursuant to the savings clause has never been directly addressed by this Court, notwithstanding that the lower court decision in this case appears to be inconsistent with this Court's decisions in *Castro* and *Felker*, and split with *Collins*. *Id.*

CONCLUSION

Based on the foregoing reasons, Mr. Okpala prays the Honorable Justices of this Court to grant review of the lower court action in this matter.

Dated: November 3, 2008.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10318-G

OKEY GARRY OKPALA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed Jun. 10, 2008)

Before CARNES and BARKETT, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated April 30, 2008. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 520 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000); *Gonzalez*

v. Sec'y Dep't of Corr., 366 F.3d 1253, 1277 n.10 (11th Cir. 2004).

Appellant's motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10318-G

OKEY GARRY OKPALA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed Apr. 30, 2008)

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Since appellant has failed to satisfy *Slack*'s test, his motion for a certificate of appealability is DENIED.

Appellant's motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

OKEY GARRY OKPALA Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CIVIL ACTION NO. 1:02-CV-1012-RWS CRIMINAL ACTION NO. 1:93-CR-002-01-RWS

ORDER

This case comes before the Court for review of Petitioner Okey Garry Okpala's Motion for Reconsideration [261], Motion for Leave to Appeal *in Forma Pauperis* [263], and Motion for Certificate of Appealability [264]. The Court has reviewed the record, and now enters the following Order.

Background

Petitioner Okey Garry Okpala was convicted on August 6, 1993, of charges relating to the importing and trafficking of heroin, and of making false statements in support of his citizenship application. On October 25, 1993, the trial court sentenced Petitioner to 360 months on the drug counts and to two 60-month sentences on the charges of making false statements. The Court of Appeals affirmed his conviction, and the

Supreme Court denied certiorari. Petitioner then timely filed a Motion to Vacate Sentence.

In an Order entered June 3, 2004 [238], this Court denied Petitioner's First Motion to Vacate Sentence. Petitioner moved to reconsider, contending that this Court erred by summarily denying Grounds 1-11, 16, 23, 24, and 26 of his Petition. On July 6, 2004 [242], this Court denied Petitioner's Motion for Reconsideration, finding that, "to the extent that Petitioner reasserts various arguments he previously made in his 204-page memorandum of law, the Court has already addressed those arguments and declines to reconsider its prior rulings." (*Id.* at 6.) On February 10, 2005 [250], the Court of Appeals for the Eleventh Circuit denied Petitioner's request for a certificate of appealability.

Petitioner then filed a Motion to Reopen his first § 2255 proceeding and a second Motion to Vacate, Set Aside, or Correct Sentence. In an Order entered on December 4, 2007 [259], the Court denied Petitioner's Motion to Reopen and dismissed Petitioner's Successive Motion to Correct Sentence for lack of jurisdiction. Petitioner now moves for reconsideration of the Court's Order of December 4, 2007, moves for a certificate of appealability, and seeks leave to appeal from that Order *in forma pauperis*.

Discussion

I. Motion for Reconsideration

Petitioner moves for reconsideration of this Court's Order of December 4, 2007, contending that this Court erred by failing to reopen Petitioner's habeas action and by failing to consider Petitioner's Rule 60 Motion pursuant to the Supreme Court's guidance in *Gonzales v. Crosby*, 545 S. Ct. 524, 125 S Ct. 2641 (2005). For the reasons provided below, the Court declines to reconsider its prior Order.

The Court's decisions are "not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure," *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 287 (N.D. Ill. 1988), and motions for reconsideration should not be filed as a matter of routine practice. LR 7.2(E), NDGa. Rather, such motions "should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the law, or the need to correct a clear error or prevent a manifest injustice." *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 674 (N.D. Ga. 1997) (citing *Preserve Endangered Areas of Cobb's History v. United States Army Corps of Engineers*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995), *aff'd*, 87 F.3d 1242 (11th Cir. 1996)).

Given the narrow scope of a motion for reconsideration, it is improper to move for reconsideration, for example, "to present the court with arguments already heard and dismissed or to repackage familiar

arguments to test whether the court will change its mind." *Bryan v. Murphy,* 246 F. Supp. 2d 1256, 1259 (N.D. Ga. 2003). Moreover, "[a] motion for reconsideration is not an opportunity for the moving party . . . to instruct the court on how the court 'could have done it better' the first time." *Preserve Endangered Areas of Cobb's History,* 916 F. Supp. at 1560.

Citing *Crosby,* 545 U.S. at 524, Petitioner contends that the Court should reopen his habeas proceedings to re-address the merits of those claims that the Court dismissed as meritless on their face. However, under *Crosby,* a motion brought under Rule 60 is improper "if it attacks the federal court's previous resolution of a claim *on the merits,* since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532 (footnote omitted). Because this Court dismissed those claims Petitioner seeks to reassert on the merits, *Gonzales* supports the Court's rejection of Petitioner's Rule 60 motion. For the same reasons as outlined in the Court's Order of December 4, 2007, the Court declines to reconsider its ruling.

Moreover, in contending that this Court erred by failing to reopen his habeas proceedings to address those claims that this Court dismissed as meritless on their face, Petitioner reasserts arguments that this Court has previously rejected. These arguments are not proper for the Court's consideration on a

motion to dismiss, and therefore, the Court declines to reconsider its Order of December 4, 2007.

Accordingly, Petitioner's Motion for Reconsideration is **DENIED**.

II. Motion for Certificate of Appealability

Petitioner also moves for a certificate of appealability on the following issue:

> Whether the district court erred in construing the Petitioner's petition for a writ of habeas corpus pursuant to the "savings" clause of 28 U.S.C. § 2255 as [a] second or successive motion to vacate without notice, opportunity to withdraw or amend, and dismissing the same for lack of jurisdiction.

(*See* Pet's App. for Cert. of Appealability at 1.)

Under 28 U.S.C. § 2253(c), an appeal may not be taken from a final order in a § 2255 proceeding unless a certificate of appealability is issued. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing the petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting

Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)).

The showing required to be entitled to a certificate of appealability neither requires nor permits full consideration of the factual and legal merits of the claims. *Gonzalez v. Sec. for Dept. of Corr.,* 366 F.3d 1253, 1267 (11th Cir. 2004). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)). Thus, a petitioner is not required to demonstrate entitlement to appellate relief in order to be given an opportunity to pursue it. *Id.* Nevertheless, the certificate of appealability requirement must be applied with its purpose in mind, which is to separate out those appeals that deserve more careful attention from the ones that do not. *Id.* "More than the absence of frivolity or the presence of good faith is required for a petitioner to clear this hurdle." *Id.*

Petitioner contends that he is entitled to a certificate of appealability because it is debatable whether the Court properly characterized his "Motion to Vacate, Set Aside or Correct Sentence" [252] as a second or successive Motion to Vacate brought pursuant to 28 U.S.C. § 2255. Citing *Castro v. United States*, 540 U.S. 375, 124 S. Ct. 786 (2003), Petitioner argues that this Court erred by failing to afford Petition notice and an opportunity to withdraw, and by dismissing his Petition for lack of jurisdiction.

In *Castro*, the Supreme Court held that several protections must accompany an order recharacterizing a motion as a motion to correct sentence because of the *res judicata*-like effect the adjudication of a § 2255 has on a litigant's ability to bring further motions attacking his sentence. *Id.* at 382-83.

It stated:

> In such circumstances the district court must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has. If the court fails to do so, the motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law's "second or successive" restrictions. § 2255, ¶ 8.

Id.

However, the Court indicated that these protections must only accompany a court's recharacterization of a movant's *first* motion to correct sentence. *Id.* at 383 (emphasis added) ("This limitation applies when a court recharacterizes a pro se litigant's motion as a *first* § 2255 motion."). Because the reason for this restriction on recharacterization "does not apply where, as in this case, the petitioner previously filed a § 2255 petition," courts following *Castro* have

uniformly held that the *Castro's* warn-and-allow-withdrawal approach does not apply to second or successive motions to vacate. *E.g., United States v. Nelson,* 465 F.3d 1145, 1149 (10th Cir. 2006) (citing *United States v. Torres,* 282 F.3d 1241, 1245 (10th Cir. 2002)); *United States v. Lloyd*, 398 F.3d 978, 980 (7th Cir. 2005) ("Although a miscaptioned initial collateral attack does not count for purposes of § 2244(b) and § 2255 ¶ 8 unless the district judge alerts the prisoner that it will use up the one allowed as of right, all later collateral attacks must be seen for what they are. A captioning error in a successive collateral proceeding cannot cost the prisoner any legal entitlement, so *Castro*'s warn-and-allow-withdrawal approach does not apply."); *see also United States v. Stewart,* No. CR 103-087, 2007 WL 2283546 (S.D. Ga. Aug. 6, 2007) ("The dictates of *Castro v. United States* only apply when a court recharacterizes a pro se litigant's motion as a first § 2255 motion, not when a pro se litigant files the equivalent of a second or successive § 2255 motion.").

Petitioner has already unsuccessfully filed his first § 2255 Motion. (*See* Motion to Vacate [219]). His challenge concerns whether the Court can recharacterize the instant motion as precisely what it is: his second motion to vacate. As the cases above illustrate, *Castro* does not require the Court to provide Petitioner notice and an opportunity to withdraw prior to

correctly describing his motion as a second motion to vacate.[1]

Neither the Petitioner has cited nor the Court has found any authority to contradict that *Castro* does not require a court to warn a litigant and offer him an opportunity to withdraw a second motion to vacate. Accordingly, the Court sees no room for reasonable jurists to debate the issue upon which Petitioner seeks to appeal. Because Petitioner has not made the requisite showing of a debatable denial of a constitutional right, his Motion for a Certificate of Appealability is **DENIED**.

II. Motion for Leave to Proceed *in Forma Pauperis*

In light of the Court's conclusion above, the Court must also deny Petitioner's Motion to Appeal *in Forma Pauperis* and certify, pursuant to Federal Rule of Appellate Procedure 24(a)(3), that the appeal is not taken in good faith. "[A] district court's denial of a

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[1] Petitioner also seems to contend that he should be allowed to file his second motion to vacate pursuant to the savings clause contained in § 2255. The savings clause allows a successive claim that is based either upon a retroactively applicable Supreme Court decision, which establishes the petitioner was convicted for a nonexistent defense and circuit law squarely foreclosed making the claim at the time of petitioner's trial. *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999). Because *Booker* is not retroactively applicable to cases on collateral review, *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005), Petitioner may not avail himself of the savings clause.

certificate of appealability is not reviewable by the circuit court." *Pruitt v. United States*, 274 F.3d 1315, 1319 (11th Cir. 2001). It is clear that to grant leave to appeal *in forma pauperis* after denying a certificate of appealability would be procedurally improper.[2] Therefore, any appeal seeking such relief would be frivolous and not in good faith. Accordingly, Defendant's Motion for Leave to Proceed *in Forma Pauperis* is **DENIED**.

Conclusion

For the foregoing reasons, Petitioner Okey Garry Okpala's Motion for Reconsideration [261], Motion for Leave to Appeal *in Forma Pauperis* [263], and Motion for Certificate of Appealability [264] are **DENIED**.

SO ORDERED this 22nd day of January, 2008.

/s/ Richard W. Story
RICHARD W. STORY
UNITED STATES
DISTRICT JUDGE

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[2] Instead, Defendant may file a renewed application for a certificate of appealability with the Court of Appeals for the Eleventh Circuit. *Pruitt*, 274 F.3d at 1319.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

OKEY GARRY OKPALA Petitioner, v. UNITED STATES OF AMERICA, Respondent.	: CIVIL ACTION NO. 1:02-CV-1012-RWS : CRIMINAL ACTION NO. 1:93-CR-002-01-RWS

ORDER

This case comes before the Court for review of Petitioner Okey Garry Okpala's Second 28 U.S.C. § 2255 Motion to Vacate, Correct, or Amend Sentence [252], his Motion for Leave to Proceed *in Forma Pauperis* [253], his Motion to Reopen his First 28 U.S.C. § 2255 Motion to Vacate [254], his Motion to Expedite Ruling [255], and his Motion to Supplement [256]. As an initial matter, Petitioner's Motion to Supplement [256] is **GRANTED**. The Court has reviewed the record, and now enters the following order.

Background

Petitioner Okey Garry Okpala was convicted on August 6, 1993, of charges relating to the importing and trafficking of heroin, and of making false statements in support of his citizenship application. On

October 25, 1993, the trial court sentenced Petitioner to 360 months on the drug counts and to two 60-month sentences on the charges of making false statements. Petitioner's conviction became final on February 2, 1998, when the United States Supreme Court denied Petitioner's petition for certiorari.

On July 20, 1998, acting *pro se*, Petitioner filed a 37-page Motion to Vacate, along with a 204-Page Memorandum of Law in support. On April 28, 1999, the district court entered an order dismissing Petitioner's 28 U.S.C. § 2255 motion. On November 7, 2000, the United States Court of Appeals for the Eleventh Circuit vacated that dismissal and directed the petition to be returned to Petitioner pursuant to Rule 2(d) of the rules governing § 2255 proceedings because the petition was not in the form required by the rules.

After the district court issued an order directing the Clerk to return Petitioner's motion, Petitioner filed a motion to Resubmit Motion to Vacate. This motion did not set forth in summary the facts supporting each ground of his motion, and the district court again instructed the Clerk to return the motion because the defects in the motion had not been cured. Petitioner then filed a Petition for a Writ of Mandamus. The Court of Appeals denied Petitioner's Writ of Mandamus but indicated that the district court had not specified in sufficient detail the reasons for the return of Petitioner's motion. The Court of Appeals did note, however, that the district court's response to the Court of Appeals' order adequately put Petitioner

on notice of the defects in his Motion. Even so, Petitioner again filed the same 39-page motion and 204-page brief.

After the case was transferred to the undersigned, this Court reviewed Petitioner's motion and directed the Government to respond solely to the four grounds for relief in his Motion that did not appear meritless on their face. The Court noted that most of Petitioner's voluminous petition is unrelated to the enumerated bases for relief. The Court summarized Petitioner's motion as bringing the following claims: (1) ineffective assistance of counsel during district court proceedings; (2) ineffective assistance of counsel during appeal proceedings; (3) the District Court's alleged actual bias against petitioner; and (4) lack of access to Court of Appeals.

In an Order entered June 3, 2004 [238], this Court denied Petitioner's First Motion to Vacate Sentence. Petitioner moved to reconsider, contending that this Court erred by summarily denying Grounds 1-11, 16, 23, 24 and 26 of his Petition. On July 6, 2004 [242], this Court denied Petitioner's Motion for Reconsideration, finding that, "to the extent that Petitioner reasserts various arguments he previously made in his 204-page memorandum of law, the Court has already addressed those arguments and declines to reconsider its prior rulings." (*Id.* at 6). On February 10, 2005 [250], the Court of Appeals for the Eleventh Circuit denied Petitioner's request for a certificate of appealability.

Petitioner has since filed a Motion to Reopen his first § 2255 proceeding. He has also filed a second Motion to Vacate, Set Aside, or Correct Sentence, a Motion for Leave to Proceed *in Forma Pauperis*, and a Motion to Expedite Ruling. The Court discusses the merits of each in turn.

I. Motion to Reopen First § 2255 Proceeding

Petitioner moves under Rule 60(b) to reopen his first § 2255 proceeding, arguing that this Court erred in dismissing Grounds 1-11, 16, 23, 24, and 26 of his petition as meritless on their face. Petitioner contends that the Supreme Court's decision in *Dye v. Hofbauer*, 546 U.S. 1, 126 S. Ct. 5, 163 L. Ed. 2d 1 (2005), handed down on October 11, 2005, requires this Court to reconsider those grounds it found meritless in its Order of June 3, 2004.

In *Dye*, the Supreme Court reversed a decision by the Sixth Circuit Court of Appeals dismissing a habeas petition on the ground that the petitioner had failed to raise a federal claim of prosecutorial misconduct before the state court. Although the petitioner had in fact raised the federal claim in his briefs, the Sixth Circuit held that the claim had been waived because the state appellate court had made no mention of it in its opinion. The Supreme Court reversed, reiterating the "obvious" rule that the exhaustion requirement "cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief

in the state court." *Id.* at 3 (quoting *Smith v. Digmon*, 434 U.S. 332, 333, 98 S. Ct. 597, 54 L. Ed. 2d 582 (1978)) (internal quotations omitted).

Contrary to Petitioner's assertion, *Dye* does not require this Court to reconsider its June 3, 2004 Order, or reopen Petitioner's first § 2255 proceeding. In this case, the Court *did* consider and rule upon the grounds for relief Petitioner raised in his initial § 2255 Petition, and found them meritless on their face. (*See* Order of Jun. 3, 2004 [238] at 8-9 & n.2.) After Petitioner moved for reconsideration on virtually the same grounds raised in the instant motion to reopen, the Court explicitly found that it "has already addressed those arguments and declines to reconsider its prior rulings." (*See* Order of Jul. 6, 2004 [242] at 6.). For the reasons stated in its Order of June 3, 2004, and its Order of July 6, 2004, the Court declines to reopen the Petitioner's first § 2255 Motion and reconsider its prior rulings. Accordingly, Petitioner's Motion to Reopen [254] is **DENIED**.

II. Second Motion to Vacate, Set Aside, or Correct Sentence

Petitioner has also filed a second motion to vacate, set aside, or correct sentence, dated November 1, 2005, pursuant to 28 U.S.C. § 2255. In support of this Motion, Petitioner contends that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), entitles him to a new sentencing hearing. He argues that

Booker applies retroactively to cases on collateral review and thus supports the grant of relief under 28 U.S.C. § 2255.

Paragraph 8 of 28 U.S.C. § 2255 provides:

> A second or successive motion *must be certified . . . by a panel of the appropriate court of appeals* to contain –
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255, ¶ 8 (emphasis added).

Given the posture of this case, Petitioner is unable to avail himself of a second or successive motion to vacate brought under 28 U.S.C. § 2255. Petitioner has failed to obtain certification from the Court of Appeals.[1] *Id.*; *see also Gonzales v. Secretary*

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[1] In any event, it is doubtful that Petitioner could obtain such certification. The Eleventh Circuit has previously rejected Petitioner's contention that *Booker* applies retroactively to cases on collateral review. *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005) (holding that "*Booker*'s constitutional rule falls

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for Dept. of Corrections, 366 F.3d 1253, 1260 (11th Cir. 2004) (stating that a district court "ha[s] no choice but to deny" a successive motion under 28 U.S.C. § 2255 if the petitioner fails to obtain a certificate from the Court of Appeals).

Accordingly, Petitioner's Second Motion to Vacate, Set Aside or Correct Sentence [252] is **DENIED**.

III. Other Motions

As a result of the Court's disposition above, Petitioner's Motion for Leave to Proceed *in Forma Pauperis* [253] and his Motion to Expedite Ruling [255] are **DENIED as moot**.

Conclusion

For the foregoing reasons, Petitioner Okey Garry Okpala's Second 28 U.S.C. § 2255 Motion to Vacate, Correct, or Amend Sentence [252] is **DENIED**. Petitioner's Motion for Leave to Proceed *in Forma Pauperis* [253] is **DENIED as moot**. Petitioner's Motion to Reopen [254] is **DENIED**. Petitioner's Motion to Expedite Ruling [255] is **DENIED as moot**. Petitioner's Motion to Supplement [256] is **GRANTED**.

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squarely under the category of new rules of criminal procedure that do *not* apply retroactively to § 2255 cases on collateral review" (emphasis in original)).

SO ORDERED this 4th day of December, 2007.

/s/ Richard W. Story
RICHARD W. STORY
UNITED STATES
DISTRICT JUDGE

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

OKEY GARRY OKPALA, Movant, vs. UNITED STATES OF AMERICA, Respondent.	CRIMINAL NO. 1:93-cr-0002 CIVIL ACTION FILE NO. 1:02-cv-1012-RWS

JUDGMENT

The Court having DENIED the motion filed pursuant to Title 28, United States Code, Section 2255,

Judgment is hereby entered in favor of the Respondent and against the Movant.

Dated at Atlanta, Georgia this 4th day of December, 2007.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Shirley J. Kennedy
Deputy Clerk

Filed: December 4, 2007
Entered: December 4, 2007
In the Clerk's Office

James N. Hatten
Clerk of Court

By: s/ Shirley J. Kennedy
Deputy Clerk